TAN PHAK TIN

v.

PP

HIGH COURT MALAYA, PULAU PINANG
RK NATHAN J
[CRIMINAL APPEAL NO: 42-18-2002]
2 JULY 2004

CRIMINAL PROCEDURE: *Charge - Framing of - Forgery of directors' resolutions - Resolutions not annexed to charges - Resolutions merely tendered as exhibits - Whether charges defective*

CRIMINAL LAW: *Penal Code - Sections 468 and 471 - Charges framed as stating s. 471 read with s. 468 - Whether such framing improper*

CRIMINAL PROCEDURE: *Appeal - Conviction and sentence, against - Charges in respect of forged directors' resolutions - Resolutions not shown to have been forged - Whether appeal should be allowed*

The appellant was convicted and sentenced for offences relating to the forging of certain directors' circular resolutions ('the resolutions'). The convictions were in respect of four charges under s. 471 read with s. 468 of the Penal Code. The sentences were ordered to run concurrently. The appellant appealed against the convictions and sentences. Counsel for the appellant contended inter alia that the forged resolutions ought to have been made as part of the charges and not merely tendered as exhibits, as was done.

Held (allowing the appeal against the convictions and sentences):

[1] There was nothing wrong in the resolutions being tendered as exhibits. It mattered not if the resolutions were exhibited as annexures or produced in court as exhibits. (p 661 f-h)

[2] The charges as framed were improper. Under s. 468, the onus was on the prosecution to prove that the appellant forged the resolutions, whereas under s. 471, there was no burden on the prosecution to show that the appellant had forged the resolutions. (p 662 d-e)

[3] Instead of sending the signature as contained in the Memorandum and Articles of Association for comparison with the sample signature obtained, the prosecution ought to have sent the resolutions containing the alleged

false signatures for comparison. The failure to do so resulted in the resolutions never being shown to be forged. There was accordingly no basis to sustain the charges at all. (p 662 g-h & 663 b)

Legislation referred to:
Penal Code, ss. 468, 471

For the appellant - Harpal Singh; M/s Harpal Singh & Co
For the respondent - V Shoba DPP

Reported by Andrew Christopher Simon

JUDGMENT

RK Nathan J:

The Charge

This is a very short appeal. The appellant faced four charges which read as follows:

1st charge:

> Bahawa kamu pada 1hb. Jun, 1998 hingga 2hb. Jun, 1998 di J. Heng Consulting Services (M) Sdn. Bhd. beralamat No. 58-A, Jalan Cantonment, Pulau Pinang dengan curangnya telah menggunakan suatu dokumen sebagai tulin iaitu 'Directors Circular Resolution' Driall (Malaysia) Sdn. Bhd. bertarikh 1hb. Jun, 1998 yang mana kamu ada sebab untuk mempercayai bahawa dokumen tersebut adalah palsu dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 471 Kanun Keseksaan dibaca bersama Seksyen 468 Kanun yang sama.

2nd charge:

> Bahawa kamu di antara 5hb. November, 1998 hingga 13hb. November, 1998 di J Heng Consulting Services (M) Sdn Bhd beralamat No. 58-A, Jalan Cantonment, Pulau Pinang dengan curangnya telah menggunakan suatu dokumen sebagai tulin iaitu 'Directors Circular Resolution' Driall (Malaysia) Sdn. Bhd. bertarikh 5hb. November, 1998 yang mana kamu ada sebab untuk mempercayai bahawa dokumen tersebut adalah palsu dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 471 Kanun Keseksaan dibaca bersama Seksyen 468 Kanun yang sama.

3rd Charge:

> Bahawa kamu di antara 3hb. Jun, 1998 hingga 31hb. Julai, 1998 di J Heng Consulting Services (M) Sdn. Bhd. beralamat No. 58-A, Jalan Cantonment, Pulau Pinang dengan curangnya telah menggunakan suatu dokumen sebagai tulin iaitu

'Directors Circular Resolution' Driall (Malaysia) Sdn. Bhd. bertarikh 31hb. Julai, 1998 yang mana kamu ada sebab untuk mempercayai bahawa dokumen tersebut adalah palsu dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 471 Kanun Keseksaan dibaca bersama Seksyen 468 Kanun yang sama.

4th Charge:

Bahawa kamu di antara 3hb. Jun, 1998 hingga 31hb. Julai, 1998 di J. Heng Consulting Services (M) Sdn. Bhd. beralamat No. 58-A, Jalan Cantonment, Pulau Pinang dengan curangnya telah menggunakan suatu dokumen sebagai tulin iaitu 'Directors Circular Resolution" Driall (Malaysia) Sdn. Bhd. bertarikh 31hb. Julai, 1998 yang mana kamu ada sebab untuk mempercayai bahawa dokumen tersebut adalah palsu dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 471 Kanun Keseksaan dibaca bersama Seksyen 468 Kanun yang sama.

She was found guilty and convicted and sentenced to 2 years, 3 years, 3 years and 3 1/2 years respectively with the sentences to run concurrently. Dissatisfied with the decision of the Sessions Court, she appealed to this court both against conviction and sentence.

Findings Of The Court

It is to be noted that each of the charges pertained to directors' circular resolutions which were tendered as exhibits. Harpal Singh for the appellant contended that since the circular resolutions were the ones alleged to have been forged, they ought to have been made as part of the charges and not merely being tendered as exhibits since the Criminal Procedure Code provides that the charges ought to be specific.

I find nothing wrong in the resolutions being tendered as exhibits. Even if they were to be annexed to the charges, such annextures could only be done as Annexture A, B, C & D to each charge. Therefore it matters not if they are exhibited as annextures or produced in court as exhibits. However if the defence had been earlier served with the chemist's report on the four resolutions and if the defence had intended to challenge the said chemist's report by referring to their own independent chemist for a further opinion, the defence could apply directly to the prosecution for copies of the alleged forged circular resolutions, or if the prosecution refuses to release them, then it would be well within the right of the defence to apply to court for an order that the copies of the said resolutions be released to them. I therefore found no merit in the first issue raised by the appellant.

The Charges

To my mind the charges as framed are improper. It is necessary in considering this issue to reproduce both sections which read as follows:

> 458. Forgery for the purpose of cheating.
>
> Whoever commits forgery, intending that the document forged shall be used for the purpose of cheating, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine.
>
> 471. Using as genuine a forged document.
>
> Whoever fraudulently or dishonestly uses as genuine any documents which he knows or has reason to believe to be a forged document, shall be punished in the same manner as if he had forged such document.

In s. 468 the onus on the prosecution is to proof that the appellant forged the said four resolutions with the intention that they be used for purposes of cheating.

However s. 471 is different. Here the prosecution must prove that the appellant fraudulently or dishonestly used as genuine, the four resolutions which she knew or had reason to believe were forged. In other words under s. 471 there was no burden on the prosecution to show that the appellant had forged the said documents. The appellant ought to have been charged either under s. 468 or under 471.

The Chemists Report

Notwithstanding the question of the four charges preferred against the appellant, the Chemist's report is most damaging to the prosecution. What the prosecution did was to send samples of signatures obtained from the person whose signature was alleged to have been forged to be compared with the signature of that person as contained in the memorandum & articles of association. Why the prosecution did this has not been explained. Instead of sending the signature as contained in the memorandum & articles of association for comparison with the sample signatures obtained, the prosecution ought to have sent the four resolutions containing the alleged false signatures for comparison. If the chemist's report had stated that the sample signatures as obtained from the person whose signature was allegedly forged, was different from that as found in the four resolutions, then the next step is for the prosecution to prove either:

(a) that the appellant committed the forgery herself pursuant to s. 468 of the Penal Code or

(b) that she fraudulently or dishonestly used the documents knowing that the documents were forged.

In this case the very subject matter of the charges namely the four resolutions were never shown to be forged. There was no basis to sustain the charges at all.

I therefore allowed the appeals and set aside the convictions and sentences and acquitted the appellant.